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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 163

COMMODITIES TRADING CORPORATION, ET AL.,
Plaintiffs-Petitioners,

vs.

THE UNITED STATES,
Defendant-Respondent

PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petition of Commodities Trading Corporation, Irving Trust Company, and other petitioners herein, respectfully shows to this Honorable Court:

A. Summary Statement of the Matter Involved

This proceeding is a suit by the plaintiffs-petitioners, Commodities Trading Corporation and Irving Trust Company against the United States to recover just compensation for 759,750.88 pounds of Whole Black Pepper requisitioned by the United States from the Commodities Trading Corporation on or about May 26th, 1944 (R. 7-10). The

plaintiff-petitioner, Commodities Trading Corporation, hereinafter called "Commodities", owned the said pepper, and the plaintiff-petitioner, Irving Trust Company, had a lien on said pepper for bank loans made by it to Commodities on the security of said pepper (Spec. Fndgs. Nos. 4 and 5, R. 13-14).

The other plaintiffs-petitioners are stockholders of Commodities, who received fractional parts of the claim sued on herein upon the dissolution of Commodities on or about January 22nd, 1946 (Spec. Fdg. 1, R. 12-18).

These individual stockholders intervened as parties plaintiff in March 1948 (Spec. Fdgs. Nos. 1 and 2, R. 13).

On May 26th, 1944, the United States War Department requisitioned the pepper pursuant to the Act of October 16th, 1941 (55 Stat. 742), as amended, and tendered the plaintiffs-petitioners $50,266.76 as just compensation, the said amount being based on the ceiling price for such pepper in effect at the time of the taking and established by Maximum Price Regulation No. 52 (Spec. Fdgs. 3, 4, 6-8, R. 13, 14 & 15).

The two said plaintiffs-petitioners declined to accept the said determination of just compensation, claiming that the pepper requistioned was, on the date of the taking, worth at least $190,000 (Spec. Fdgs. Nos. 3, 6 and 7, R. 3, 14, 15).

The Army proceeded to seize plaintiffs-petitioners' pepper without making the payment provided for by 55 Stat. 742. Plaintiffs-petitioners therefore brought this suit for $190,000 and interest on the 2nd day of October, 1945. On the 27th day of November, 1945, two months after suit was brought and eighteen months after seizure, one-half of the award offered by the War Department, with 4% interest, or $26,404.41, was paid to the said plaintiffs-petitioners. The said $190,000 and interest, less the sum of $26,404.41,

with interest, as above stated, is the subject matter of this suit (Spec. Fdgs. 6 and 7, 28, R. 14, and Complaint).

Plaintiffs-petitioners claim and claimed below that the loss which they suffered through the taking of their pepper is the measure of their just compensation for the taking thereof (Spec. Fdg. No. 6, R. 14), and that such loss could not have been less than:

(a) the market price in India in May 1944 of 21¢ for Whole Black Pepper delivered in New York, insurance and freight paid (Spec. Fdg. No. 23, R. 21, Tr. 14); or

(b) the price which, in May 1944, it was reasonable to expect could be obtained for Whole Black Pepper at the end of the War, less carrying charges to that time, pepper being non-perishable and easily stored (Spec. Fdg. No. 25, R. 22), a price far in excess of 21¢ (Spec. Fdg. No. 17, R. 18 and Tr. 7, 8, 123).

(c) the price which plaintiffs-petitioners could actually have obtained for the pepper at the time of decontrol, less carrying charges from May 1944 to that date—more than 50¢ per pound (Spec. Fdg. No. 17, R. 18); or

(d) the price at which it was reasonable to estimate that said pepper would have sold in the open market in New York in May 1944, had there been no War, a price in excess of 20¢ (Tr. 7, 8, 14, 15, 27, 28, 35, 36, 37, 56, 64, 65, 66, 67, 68, 69, 71, 73, 99, 100, 102, 110, 111, 112, 135, 136, 138, 140, 141-144; Spec. Fdgs. 9, 15-16).

(e) the replacement cost—more than 50¢ per pound (Spec. Fdg. No. 17, R. 18, Tr. 96, 41-2); or

(f) the net price for its pepper which could have been obtained in May 1944 through the use of said Whole Black Pepper in producing synthetic or imitation pepper and the sale of said imitation pepper at the ceiling price established therefor by the Office of Price Administration, a price in excess of 30¢ (Spec. Fdg. No. 18, R. 18-19); or

(g) plaintiffs-petitioners' cost plus a reasonable profit for holding the pepper for an average period of eight years, 20¢ plus (Spec. Fdg. No. 24, R. 21-22).

The Court of Claims found that the value of the pepper was 15¢ a pound (Spec. Fdg. No. 27, p. 23), or about 7¢ a pound less than the lowest value which could have been found on any one of the above bases. The Complaint asks for compensation at the rate of only 22¢ per pound. So the fact that some of the bases would support a much higher price is immaterial.

As to (a) above:

British India was the only market in the world where pepper could have been purchased in quantity in May 1944 (Tr. 60, 61). There was no ceiling price in India, it produced normally upwards of 30,000,000 pounds per year and it was shipping pepper to many of the countries of the world in 1943 and 1944, but subject to the restrictions of the Allied Food Board, which allocated to various countries the amounts which could be shipped from British India (Tr. 12-14, 43, 44, 55, 60-2).

There was a regular market in India in May 1944, and for many months prior and subsequent thereto, and the May 26th market price, freight and insurance paid, delivered in New York, was 21 cents per pound (Spec. Fdg. No. 23, R. 21, Tr. 14).

The Court of Claims found:

"23. Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 percent of the pepper it raises and exports the balance.

"Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the

United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		*Cents*
February	21.25	July	19.71
March	21.20	August	19.40
April	18.55 to 19.00	September	16.90
May	20.00	October	19.76
June	20.99		

"These prices included insurance and freight paid to New York. In other words they were prices delivered in New York.

"However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maximum prices established in that schedule, i. e., 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper."

(Spec. Fdg. No. 23, R. 21)

No part of the pepper allocated to the United States was imported prior to 1945, despite the great demand for pepper in the United States.

Plaintiffs-petitioners contended that this Indian market price, which was fair and only 50% in excess of the average pre-war price for many years, and slightly below the ceiling price established by the British Government in England when that Government controlled the entire production of new pepper, constitutes a fair measure for determining market value and just compensation for plaintiffs-petitioners' pepper. Such action would not in any way be making a fetish of market price, but would merely adopt a definite fair and logical basis for determining just compensation.

While, of course, the Indian price was influenced by the fact that there was a War, no bullish element affecting market price, which was criticized in the *Cors* case, was present in the Indian market, and the price was held down

to a level considered fair by the British Government through the restriction of exports.

As to (b) above:

In May 1944, there was a worldwide shortage of pepper. This resulted from two main causes.

(1) the cessation of planting pepper vines for several years prior to the War due to the abnormally low price, coupled with the fact that pepper vines do not bear at all during the first four years after planting and do not reach normal production until seven years, and then have a limited over-all bearing life of approximately eleven years. (Spec. Fdg. No. 26, R. 22-23). This would have brought about a scarcity and high prices had there been no War, as is discussed in (d) following; and

(2) the Japanese occupation of all producing pepper areas except British India and the destruction and cessation of planting caused by them (Tr. 17, 60).

With pepper selling at $1.00 per pound and more in countries where prices were unrestricted (Tr. 22-23), and with the constant shrinking in the small available supply, it was certain in May, 1944 that a great scarcity and high price would obtain at the end of the War.

Plaintiffs-petitioners' pepper was non-perishable and would last unimpaired in value for many years (Spec. Fdg. 25, R. 22). It was easily stored and plaintiffs-petitioners could have retained possession of their pepper until the end of the War and until the decontrol of the commodity, and could then have sold at the high prices which did obtain and which were certain to have existed. (Tr. 7-8).

On this matter, the Court below states the general equities of the situation and the special equity of plaintiffs-petitioners as follows (R. 40-41):

"Plaintiff, Commodities Trading Corporation, was not a trader in pepper; it was rather an investor in

pepper. It began buying pepper in 1933 and by Pearl Harbor Day in 1941 it had accumulated a stock of 21,000,000 pounds. It was accumulating this stock in the expectation that there would be a considerable rise in the price of pepper, at which time it expected to dispose of it. (Tr. 31-35).

"Commodities Trading Corporation bought most of its pepper at low prices in anticipation of the rise in price which the history of the industry showed must inevitably come. Except for the fact that the Government requisitioned its pepper, Commodities would have held it until the next rise in price and then would have sold it. It has been denied the right to do this by the Government's requisition. As it turned out, the price of pepper shot up to more than 40 cents immediately after restrictions had been removed, and it went on up to 75 and 80 cents (Spec. Fdg. No. 24, R. 21-22; Spec. Fdg. No. 17, 18, R. 18, 19).

"A very great increase in price was inevitable upon the removal of restrictions. The price of pepper had greatly declined beginning in 1935 and 1936, and was still down when the ceiling price was fixed (Chart in Spec. Fdg. No. 9, R. 15-16). This resulted in but little planting and in the neglect of the growing vines, which resulted, in turn, in a scarcity (Tr. 143-4). In addition to this, the Japanese invasion of Indo-China and Sumatra further reduced the supply (Tr. 17). These factors made it inevitable that there would be a very great increase in the price after restrictions were removed. Had plaintiff's pepper not been requisitioned there was no doubt they could have continued to hold it and could have gotten for it a price far in excess of the ceiling price fixed by the Office of Price Administration."

Upon the basis of the above, the Court of Claims stated in its opinion:

"This so-called 'retention value' is particularly applicable in this case."

As retention value is based upon post-war market price, there cannot possibly be present any of the factors having a bullish effect upon prices which the majority opinion of the Court indicated in the *Cors* case should be excluded in determining just compensation.

As to (c) above:

This basis is supported by the facts and discussions in (b) above, plus proof that the market in New York actually was 50¢ plus as soon as governmental restrictions on prices were removed. (Tr. 96).

As to (d) above:

The pepper vine is grown in the jungle. There is a continuous fight against the jungle to preserve the gardens from being swallowed up. The price of pepper reached an unprecedented high for modern times, at 41 cents per pound in 1927 and 1928. This induced great plantings by the natives, who are the producers of this commodity.

Owing to the characteristics of the pepper vine, however, which does not begin to bear until four years after planting, and does not reach normal production until seven years after planting, as immediately above stated, there was an abnormal production, beginning about 1934. This abnormal production brought abnormally low prices and pepper fell by 1938 to 3 cents plus a pound, an unprecedented low, and far below its cost of production. But by 1936 the natives had ceased to plant new vines and had allowed the jungle to overrun and reclaim many of the gardens. By 1940 production had dropped 40%. These facts insured a scarcity of pepper by 1943 or 1944, as pepper vines do not continue to bear indefinitely, but cease to bear when the plant is about fourteen years of age. Hence, the vines that were planted as a result of the burst of enthusiasm over the high prices of 1927 and 1928 were already ceasing to bear by 1941, and the vines which had been planted prior

to 1927 had already gone out of production. As there were no new vines planted in 1937, 1938, 1939, 1940 or 1941, there could be no large production until after 1944. (Spec. Fdg. No. 26, R. 22-23, and Chart in Spec. Fdg. No. 9, R. 15-16).

The situation above described is shown in Special Findings 9 and 26, but the facts shown by the Record are far stronger (Tr. 14-15; 65-68; 138-145).

The pepper market is most sensitive to shortages, and by 1944 there would have been high prices, much higher than the average over seventy years, of 13½ cents.

The opinion states:

> "There is set forth in finding 9 a graph showing the rise and fall in the price of pepper over a period of about 75 years. This shows a marked fluctuation in the price of it in fairly regular cycles. There is a good reason for this. Practically the entire supply of pepper comes from Sumatra, French Indo-China, and India. The pepper vine grows in the jungle. Before planting, the jungle must be cleared and it must be kept cleared. When prices are high the natives plant pepper; but when prices decline, they neglect their vines and allow them to be destroyed by the encroachment of the jungle. The resulting scarcity causes the market to rise. Prices stay high for several years because it takes about 4 years for a pepper vine to bear." (R. 25-26).

As to (e) above:

Commodities had no opportunity to replace its pepper until decontrol, when the price immediately shot up to 50¢ per pound and more (Tr. 96).

As to (f) above:

It was shown that Commodities had an outlet for its pepper in quantity at an O.P.A. ceiling price which equals approximately 4 cents per *ounce*, by mixing with three times the quantity of cheap adulterants or dilutants, such

as parched wheat, cottonseed hulls, etc. and selling the concoction for 16 cents per pound (Spec. Fdg. No. 18, R. 18-19).

As to (g) above, the Court found a *partial* cost for Commodities' pepper at 12.7¢ per pound, but stated that while it had included interest on the cost of *pepper* purchased and held for an average of nine years, it had allowed nothing for interest on the cost of storing the pepper for such average years or on other expenses, and showed that other overhead expenses had been omitted. (Spec. Fdg. No. 24, R. 21-22).

However, the Court stated in said finding:

> "The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses to Commodities during the period the pepper was purchased and held. No interest is computed upon costs of any of the carrying charges but only on Commodities' original costs."

In its tabulation on page 36, the Court allows for "Bank interest, commissions, cables, exchange, etc." 2.75% per annum (Spec. Fdg. 24, R. 21-22). This was an entirely inadequate allowance as was shown by the evidence.

The true cost of the pepper taken was 14.59 cents per pound and the average cost of all the pepper h 'd by Commodities at that time—over 16,000,000 pounds—was also 14.59 c nts per pound (Tr. 123-4).

Moreover, if cost is to be used as a basis for determining just compensation, a reasonable profit should be added. The letter by the Chief of the O. P. A., Defendant's Exh. 3, states that the customary profit on pepper is ½ cent per pound, but this applies to sales in the usual course of business, where pepper is bought one month and sold, perhaps, the next. However, where it has been held for eight years, that ½ cent should be multiplied many times. Allow-

ing for the omitted costs and overheads and for a reasonable profit, the figure comes to more than 20 cents per pound.

The above questions were raised in briefs and argument made before the Court of Claims and the judgment of that Court could not have been rendered without deciding those questions.

B. Specification of Errors

The Court of Claims erred:

1. In failing to find that the fair value of 759,750.88 pounds of Whole Black Pepper, the subject of this action, was on May 26, 1944, the sum of $188,500 or 22 cents a pound and in finding instead that said fair value was $113,962.63 or 15¢ per pound.

2. In failing to find that the just compensation to which plaintiffs are entitled for said property requisitioned and payment by the United States therefor is 22¢ per pound, or a total of $188,500, together with interest at 4 per cent, (4%) per annum from May 26, 1944, as an element of just compensation, less the sum of $26,404.14 paid on November 27th, 1945, with interest thereon from the date of payment, and in finding or concluding instead:

> "• • • that the Commodities Trading Corporation, or its distributees, are entitled to recover, and it is therefore adjudged and ordered that Commodities Trading Corporation, or its distributees, are entitled to recover of and from the United States a total of one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) plus compensation for delay in payment computed at (4) per cent per annum on one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) from May 26, 1944, to November 27, 1945, less the amount paid plaintiffs on the latter date of twenty-six thousand four hundred four dollars and fourteen

cents ($26,404.14) and plus a further sum for delay in payment computed at four (4) per cent per annum on eighty-eight thousand eight hundred twenty-nine dollars and twenty-five cents ($88,829.25) from November 27, 1945, until paid." (R. 23).

3. In failing to find that the market price of Whole Black Pepper in British India on May 26, 1944, 21¢ per pound, delivered in New York, with freight and insurance paid, constituted a minimum measure of plaintiffs-petitioners' just compensation for the 759,750 pounds of Whole Black Pepper requisitioned by the United States Army from plaintiff, Commodities Trading Corporation, on the 26th day of May, 1944.

4. In failing to find that the "retention value" of plaintiffs-petitioners' said pepper, that is, the difference between the prices which it was reasonable to estimate on the 26th day of May, 1944, would exist at the end of the War and upon decontrol of pepper from Government fixed prices, less the estimated carrying charges from May 26th, 1944 to the expected end of the War and of decontrol, is a proper measure for determining the just compensation to plaintiffs for the pepper in question, seized by the United States Army, and that plaintiffs-petitioners are therefore entitled to recover the full amount demanded in the Complaint, or $190,000, with interest, less the payment of $26,404.14, with interest.

5. In failing to find that the price at which plaintiffs-petitioners could have replaced the said pepper at the first opportunity for so doing was in excess of 50 cents per pound, and that such replacement cost measures the just compensation to which plaintiffs-petitioners are entitled, and that as said replacement value is far in excess of the amount demanded in the Complaint, plaintiffs-petitioners are entitled to the full amount demanded therein.

6. In failing to find that the price at which it was reasonable to estimate in May, 1944, Whole Black Pepper would have sold at that time had there been no War, is a minimum measure of just compensation to plaintiffs-petitioners, which said price was in excess of 20 cents per pound.

7. In failing to find that the net amount which plaintiffs-petitioner could have realized from the use and sale of its pepper as the foundation for synthetic or imitation pepper constituted a factor for determining just compensation and required an allowance therefor of at least 22 cents per pound.

8. In failing to find that the average cost of all of plaintiffs-petitioners' pepper at the time of the requisition here in question was 14.59 cents per pound, and that the average cost of the pepper actually requisitioned was 14.59 cents per pound, and that such amount, plus a fair profit, was in excess of 20 cents per pound, and that such amount constitutes a minimum measure of just compensation.

9. In finding in its 24th Special Finding as follows:

"The total cost of the pepper to Commodities is as follows:

	Pounds	*Per pound*	*Total cost*
Original cost	773,201.00	$0.0621046	$53,143.13
Shrinkage	13,450.12	.....	.....
Cost of pounds delivered in May 1944	759,750.88	.069948	53,143.13
Carrying charges:			
Labor, handling at (average) per bag of .04422			$256.71
Cartage, etc., at (average) per bag of .076			442.31
Storage, at (average) per bag per month of .03			19,591.62
Bank interest, commissions, cables, exchange, etc., amounting to approximately 2.75% per annum			13,672.99
Insurance, at premiums of approximately $4.368 per $100 value for 9 years 4 months			3,377.34
Taxes, on basis of average stored pepper during period 1936 to 1943 inclusive			1,076.67
Total direct costs			91,560.77
Allowance for general administrative expenses at 1% per annum during carrying period, of 9.33% on original cost of $53,143.13			4,958.25
Total costs plus estimated administration expense, or an average cost per pound of $0.127			96,519.02

"The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses to Commodities during the period the pepper was purchased and held. No interest is computed upon costs of any of the carrying charges but only on Commodities' original costs." (R. 21-22)

10. In failing to find that on the 26th day of May, 1944, here was no market in Whole Black Pepper in the United States and none had been offered during any month of the year 1944 prior to October, when the O.P.A. raised the ceiling price to 10¢ per pound.

11. In finding that the ceiling price of 6.75¢ per pound for Whole Black Pepper was approximately the fair market price as of December 11th, 1941 (Spec. Fdg. No. 10, R. 16) and in failing to find that such market was a depressed one.

12. In finding that between September 30th, 1943 and the date of the requisition on May 26th, 1944, very little Whole Black Pepper was sold out of these inventories (inventories of importers) (Spec. Fdg. No. 14, R. 18).

13. In failing to find that the pepper sold by Commodities and referred to in Special Finding No. 19 (R. 19), was sold under pressure and was not a voluntary sale (See Opinion of the Court).

14. In failing to find that the pepper sold by plaintiffs at 6¢ per pound, mentioned in said 19th Finding, was sold under pressure and was not a voluntary sale.

15. In finding that plaintiffs offered to sell 1,000,000 pounds of pepper to the Army at 9¾¢ per pound, as found in Finding No. 22 (R. 20).

16. In finding that between January 1st, 1943, and November 8th, 1943, plaintiff, Commodities Trading Corporation, had sold 98,267 pounds of Whole Black Pepper at 5¢ a pound (Spec. Fdg. No. 22, R. 20), and in failing to find that said sale was not voluntary, but was under pressure.

17. In failing to find in connection with the facts found in said Finding No. 26 (R. 22-23), that it is seven years after

planting before pepper vince produce at a normal rate, and in finding in said 26th Finding that the pepper vine has a bearing period of from ten to fifteen years, with an average bearing period of about eleven years, and in failing to find that the total bearing period does not exceed eleven years, and that the period during which normal production continues does not exceed seven or eight years.

18. In finding in said 26th Finding that new plantings would have begun to bear about 1945 or 1946, and in failing to find that there were no new plantings of any consequence subsequent to 1937 and prior to the Japanese invasion in the Winter of 1942.

19. In failing to give sufficient effect to the market price in British India, at the date of requisition, in finding just compensation.

20. In failing to give sufficient effect in determining just compensation to the "retention value" of plaintiffs' pepper, based upon what plaintiffs could actually have realized for their pepper at the end of price control, if it had not been seized by the Government.

21. In failing to give sufficient effect in determining just compensation to what plaintiffs could probably have received for their pepper upon the end of price control, viewed from conditions as they existed at the time of requisition.

22. In failing to give sufficient effect in determining just compensation to the price which would have obtained in the United States in May 1944 and on May 26th of that year, if there had been no War.

23. In failing to give sufficient effect in determining just compensation to the replacement cost of the requisitioned pepper.

24. In failing to give sufficient effect in determining just compensation to cost plus reasonable profit.

25. In giving effect in its determination of just compensation to plaintiffs' offer to sell to the Army, referred to in Special Finding No. 22 (R. 20).

26. In giving effect to Commodities' petition for an amendment of Price Schedule 52, referred to in Special Finding No. 21 (R. 19-20) in finding the just compensation for the requisitioning of the pepper here in question.

27. In receiving in evidence Defendant's Exhibits Nos. 2, 3 and 4, over plaintiffs' objections (Tr. 199, 201).

28. In refusing to receive in evidence the affidavits of Fletcher H. Long and Ralph W. Olmstead, forming a part of Joint Exhibit "K" in Paragraph 15 of the Stipulation of Facts between the parties.

29. In refusing to receive in evidence Plaintiffs' Exhibit No. 5 for Identification.

30. In finding that part of Finding No. 23 (R. 21) wherein the Court found the market price of Indian pepper at 20¢ instead of 20.99 for May 1944.

31. In failing to find that on or about March 10, 1944, the United States, acting through the War Food Administrator, requisitioned, or attempted to requistion approximately 3,964,800 pounds of Whole Black Pepper owned by plaintiff.

32. In failing to find that plaintiffs instituted an action in the District Court of the United States, District of Columbia, against the Federal Surplus Commodities Corporation, Claude R. Wickard, Individually and as Secretary of Agriculture, and other officials of various divisions of the Department of Agriculture, praying for an injunction to prevent the requisitioning and removal of said pepper on

the ground that said requisition was not authorized by the Act of October 16, 1941, under which such pepper was purportedly requisitioned, in that pepper did not constitute "military or naval equipment, supplies or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions," and that said pepper was requisitioned for civilian use, rather than for the defense of the United States.

33. In failing to find that an answer on behalf of the Governmental Departments and a Motion for Summary Judgment on their behalf were filed in said action on or about May 22, 1944. In support of said motion, and in justification of said requisition or seizure, affidavits of Col. Ralph W. Olmstead, H. C. Albin and Fletcher H. Long were submitted by the Attorney-General. Copies of said affidavits are attached to the Stipulation, Section K thereof and marked Exhibits "J" and "K" and "L", and were offered in evidence by plaintiffs.

34. In failing to find that said affidavits set forth that it was the intention of the Government to requisition approximately 28,000,000 pounds of pepper (which was practically all the pepper in the United States), and to distribute the same among grinders and packers for delivery in part to the general public, and in part for grinding and sale to the Armed Forces of the United States. That said affidavits, as the grounds of said procedure, set forth that for many months it has been impossible to purchase Whole Black Pepper in the United States at the ceiling price fixed by O. P. A.

35. In failing to find that on May 26, 1944, there were free markets for Whole Black Pepper in certain Central

and South American countries, and certain European countries. In those countries, pepper of the kind here in question was selling for from 40¢ to $2.00 per pound.

36. In failing to find that export licenses permitting exports to countries of the Western Hemisphere were required and were granted from time to time to various holders of pepper in 1943, 1944 and 1945.

37. In failing to find that most of this export pepper was restricted as to price by said Regulation 52 of the O. P. A., but higher prices were permitted than in the United States, and plaintiff, Commodities, in 1945 sold upward of 35,000 pounds of white pepper to Argentina at 30.93¢ to 32.31¢ per pound.

38. In failing to find that there is a fairly constant relation between the price of black and white pepper of 5 to 7, because white pepper comes from the same vine as black pepper and black can be transferred into white by a simple process called decortication, which removes the outer layer of the pepper berry, the 31¢ to 32¢ price above referred to was the equivalent of 21¢ plus for black pepper.

39. In failing to find that on May 26, 1944 and from January 1, 1944 to October, 1944, while the O. P. A. was holding down to 6½¢, the price allowed to plaintiff, Commodities, and a very few others, which were classed as bulk dealers, it was permitting wholesalers and grinders to sell ground Lampong black pepper in large quantities at 12½¢ per pound and more.

40. In failing to find that the cost of grinding whole black pepper was only a small fraction of a cent per pound.

41. In failing to find that the pepper for which such prices of 12½¢ and more were allowed was sold in barrels

and the cost of selling was negligible as purchasers would have flocked to the premises of any dealer who would sell legally for that price.

42. In failing to find that on May 26, 1944, and for several years prior thereto, Lampong Black Pepper was sold to consumers usually in small tins or packets containing 1, 1½ or 2 ounces, which retailed at about 10¢. There was little change in the prices of these small packets to consumers, regardless of the fluctuations in the price of pepper.

43. In failing to find that the average consumption of black pepper in the United States for family use was only one-quarter pound per person per year.

44. In failing to find that plaintiff, Commodities, was not allowed at any time while O. P. A. was in existence to replace its requisitioned pepper by purchasing at prices higher than current ceiling prices and it was impossible to purchase at such prices.

45. In failing to find that when pepper was decontrolled was the first time that plaintiff, Commodities, had the opportunity to replace its pepper.

46. In failing to find that the 78,000,000 to 100,000,000 pounds of Whole Black Pepper, found by the Court in its 8th Special Finding of Fact, constituted nearly all of the pepper that there was in the world at that time and was fifteen to twenty times as much pepper as was customarily on storage in the United States before plaintiff-petitioner, Commodities, began its operations.

47. In failing to find that the average price of Lampong black pepper over a period of fifty years preceding the War is 13½¢ and at least that amount over a period of twenty-five or fifteen years.

48. In failing to find that the market price for Whole Black Pepper of the kind here in question was 20.99¢ per pound for May 1944, and the same for June of that year.

49. In failing to find that pepper vines do not produce at all until four years after planting, do not reach normal production until seven years after planting, and then, after seven years of normal bearing, cease to bear.

50. In failing to find that pepper is expensive to plant and requires fertilizer and constant work to protect it from the encroachment of the jungle.

51. In failing to find that the low prices of 1935-40 curtailed planting and by 1937 or 1938 new planting was practically at an end.

52. In failing to find that by 1939, 1940 and 1941, the reduction of planting and the abandonment to the jungle of many of the less economical gardens had had a marked effect upon production and it had fallen in 1941 to less than 60% of the heavy years of 1935, 1936 and 1937, although the weather, which has an important effect, was favorable to the production of a large pepper crop.

53. In failing to find that even had there been no War, there would have been a scarcity of black pepper by May 26th, 1944 and a price in excess of 20¢.

54. In failing to find that had there been no War, there was nothing that would have changed the pattern of the recovery from the low prices existing shortly prior to the War from the pattern of prior recoveries.

55. In failing to find that the Army requisitioned far more Lampong Black Pepper than it needed and had on hand large quantities at the end of the War.

56. In failing to find that efforts were made by dealers and representatives of the pepper trade to induce the Army to return this surplus pepper to the persons from whom it had requisitioned pepper, but the Army refused so to do.

57. In failing to find that on or about the 16th day of November, 1946, plaintiff, Commodities, or its individual stockholders, said plaintiff being in the process of dissolution, were offered by the Government the privilege of purchasing a proportion of the pepper requisitioned from plaintiff, Commodities, at 75¢ per pound.

58. In failing to find that this offer was accepted by some of said Stockholders.

59. In failing to find that there was nothing that would have changed the pattern of this recovery from those of previous cycles.

60. In failing to find that while the ceiling price of 6¾¢ fixed on December 8, 1941, was the same as the market price on the day before the Pearl Harbor attack, the market was depressed by the following factors: (1) some months previously Leon Henderson, the first head of the O. P. A., wholly without authority, demanded that the Produce Exchange in New York City, where contracts for the future delivery of pepper were traded in, increase its margin required on the unit of trading from $250 per unit of thirteen tons to $1,000, and gave notice that the Government would not allow speculators in pepper to make War profits. (2) When in the Fall of 1941 it seemed likely that Japan would go to War and attack the Dutch East Indies, the growers of pepper in Sumatra, where all the Lampong pepper is raised, exported their pepper as fast as they could turn it into cash and prevent it from falling into the hands of the

Japanese. As the United States of America was the only market open to them, this resulted in the dumping of huge quantities on the United States market.

61. In failing to find that the price to which the market for pepper in New York would have risen by May, 1942, if there had been no ceiling price, was 40-50¢ per pound.

Submitted herewith and marked Exhibit "A" is a copy of plaintiffs' printed Request for Special Findings of Fact by the Court below.

C. The Reasons Relied Upon for the Allowance of the Writ

The questions relied upon are Federal questions arising under the Constitution of the United States, and more particularly, of Amendment V thereof, and Public Law 274, 77th Congress, as amended by Public Law 507, 77th Congress, and Public Law 104, 78th Congress.

While this case involves only approximately $150,000, there were two additional requisitions made of pepper of petitioner, Commodities Trading Corporation, by the Army claims for which are now pending before the Court of Claims, and one claim for pepper requisitioned by the United States Navy, the total amount involved is in excess of $500,000. There is at least one additional claim pending for pepper requisitioned from others, and petitioners understand that there are several other claims pending. There are a number of persons interested in these claims, as there are fifteen plaintiffs in the case at bar.

The ultimate question, namely, just compensation to plaintiffs-petitioners for the pepper requisitioned by the Army, or, as this Court has held, the loss incurred or suffered by the requisitionee through such requisition, is one concerning which this Court "has been careful not to reduce the concept to a formula" *U. S.* v. *Cors*, 337 U. S. 325.

Plaintiffs-petitioners, mindful of the above, proved the facts with respect to all of the following bases which have been resorted to by the Courts for determining just compensation, namely:

Market price (in British India); retention value based on what actually happened; retention value based upon what could reasonably have been foreseen at the date of taking; estimated market value at the time of taking if there had been no War; replacement value; value for use in producing imitation or synthetic pepper; cost.

There was no contradiction of plaintiffs-petitioners' proof by defendant, and, indeed, the Court of Claims found facts with respect to each of the above bases substantially as claimed by petitioners. These facts sustained an allowance of more than 20 cents per pound on each basis. But the Court of Claims then found that plaintiffs-petitioners had offered to sell one million pounds of pepper to the Army at 9¾¢ and had asked for certain increases in the ceiling price of pepper that would have brought that ceiling price to about 11¢ per pound at the date of taking if the application had been granted and had made other involuntary sales at less than 20¢.

The offer to sell to the Army and the petition for an increase were shown by evidence received over the objection and exception of the plaintiffs-petitioners, and such action is included in the plaintiffs-petitioners' assignment of errors.

Upon all of the foregoing, the Court of Claims obviously made a compromise decision, giving some effect to the six bases shown by plaintiffs-petitioners, but taking account, also, of the offer to sell and application of plaintiffs above referred to and to defendant's contentions that the ceiling price of 6½¢ was controlling.

Thus, the Court of Claims in stating its conclusion says:

> "Taking into consideration Commodities' costs and the price it undoubtedly could have secured for its pepper had it been permitted to hold it until after restrictions had been removed, and also these sales at 10 cents, at 14.19 cents, and at 16 cents, we conclude that 15 cents a pound is just compensation." (R. 27)

The sales referred to above were made many months after the requisition here in question and none of the matters stated by the Court was in contradiction of any of plaintiffs' claims.

The questions which will be presented to this Court, if plaintiffs-petitioners' application is allowed, are new and novel and have not been passed upon directly by any Court, so far as known to plaintiffs-petitioners. They are:

1. Where a ceiling price has put a stop to and prevented all dealings in a commodity in the United States, and where such condition has continued for many months, and where the commodity in question is not produced in the United States, but is produced to the extent of many million pounds in a foreign country, British India, and where there was an active market in British India at the time of a requisition of said commodity in the United States, and where such market price in India is a reasonable and fair one, much below the market prices in many other countries of the world, and not excessive, based on the average price for a number of years, and much below the price which could reasonably be expected at the end of the War, is not such market price in India the best measure of just compensation?

2. Where there was no market in the United States, for the reasons and to the extent stated immediately above, and where a commodity requisitioned by the Army is not perishable, but lasts for decades unimpaired in value, and is easily and cheaply storable, is

not the price which it was reasonable to foresee, at the time of seizure, would obtain at the end of the War and upon decontrol, less the cost of storing and carrying the commodity until that time, a proper measure for determining just compensation?

3. Is not the actual profit which plaintiffs-petitioners could have obtained by holding their pepper until decontrol and selling it immediately upon decontrol a proper measure of "retention value" or of replacement cost and of just compensation?

4. Where conditions are such that a shortage in pepper would have existed in May 1944, had there been no War, is not the market price which could reasonably be foretold under those circumstances a minimum amount to allow to plaintiffs-petitioners for the requisitioning of the pepper here in question?

5. Is not the net profit which plaintiffs-petitioners could reasonably have made by using their pepper for producing imitation or synthetic pepper a proper measure for determining just compensation?

6. To what extent is cost to be considered in determining just compensation, and to what extent are gratuitous services and contributions to be included in the cost of a corporation, which was in effect a joint venture by four friends?

7. Where a corporation has embarked upon an enterprise of building up a large inventory of Whole Black Pepper, and where, for nearly one hundred years there has been a cycle of high and low prices fairly evenly spaced at about fourteen years apart, and where there was a practical certainty in May 1944 that by holding said pepper plaintiffs-petitioners could sell at the end of the War at great profit and where, if there had been no War, they could certainly have made a large profit, can just compensation be less than what it could reasonably have expected to realize?

While the fact that plaintiff-petitioner was not a trader or dealer in pepper, and the arguments based on that fact are peculiar to the case at bar, and while the opportunity to prove that there would have been a scarcity of pepper by May 1944, even if there had been no War, and the arguments based thereon are probably restricted to cases involving the requisition of pepper or some other commodity, the production of which cannot be expanded for many years, nevertheless, all the other questions are ones which will, or may, arise in most cases brought to recover just compensation for seizures during the War, and it is in the public interest that those questions be decided.

For these reasons, this case should be brought up by certiorari and the appeal determined by this Court, because not only is it a case of importance, but it involves questions of great importance, which it is in the public interest to have decided by this Court of last resort.

D. Prayer for the Writ

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued to review the judgment of the Court of Claims of the United States, determining that petitioners are entitled to recover of and from the United States a total of only one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63), plus compensation for delay in payment computed at four (4) per cent per annum on one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) from May 26, 1944, to November 27, 1945, less the amount paid plaintiffs on the latter date of twenty-six thousand four hundred four dollars and fourteen cents ($26,404.14), and plus a further sum for delay in payment computed at four (4) per cent per annum on eighty-eight thousand eight

hundred twenty-nine dollars and twenty-five cents ($88,829.25) from November 27, 1945, until paid, instead of determining that your petitioners are entitled to recover the amount prayed for in the Complaint, namely, one hundred eighty-eight thousand, five hundred dollars ($188,500.00), with interest, but less $26,404.14 with interest.

Dated: New York, N. Y., July 2, 1949.

EDWARD L. BLACKMAN,
Counsel for Plaintiffs-Petitioners,
120 Broadway,
New York, N. Y.

STATE OF NEW YORK,
County of New York, ss:

Edward L. Blackman, being duly sworn, says:

That he is counsel for all of the plaintiffs-petitioners; that he prepared the foregoing petition and that the allegations thereof are true, as he thoroughly believes.

EDWARD L. BLACKMAN.

Subscribed and Sworn to before me this 2nd day of July, 1949.

SAMUEL COHEN,
[SEAL.] *Notary Public, State of New York,*
Residing in N. Y. Co. No. 370, Reg. No. 219-C-0.

Commission expires March 30, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 163

COMMODITIES TRADING CORPORATION, et al.,
Plaintiffs-Petitioners,

vs.

THE UNITED STATES,
Defendant-Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion Below

The majority and dissenting opinions of the Court of Claims and the Court's Special Findings of Fact and Conclusions of Law are found on pages 11 to 30 of the Record.

II

Jurisdiction

1. The statutory provision believed by the petitioners to sustain jurisdiction of this Court is Title 28, U. S. Code Annotated, Section 288, as provided by the Act of February 13, 1925, Chapter 229, Section 3, 43 Stat. 939.

2. The Statute involved is Public Law 274, 77th Congress, approved October 16, 1941, Chapter 445, as amended by Public Law 507, 77th Congress, approved March 27, 1942; Public Law 104, 78th Congress, approved June 30, 1943. The pertinent provisions of this Statute are as follows:

> "That whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1944, determines that (1) the use of any military or naval * * * supplies * * * is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, * * *. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act, * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the Fifth Amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for such property, is unwilling to accept the same as full and complete compensation for such property, he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by Sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be the fair and just compensation for such property. * * *"

3. The judgment of the United States Court of Claims s rendered on the 4th day of April, 1949 (R. 25). This tition was docketed on the 5th day of July, 1949, the 3rd d 4th of July, 1949 being legal holidays.

4. The basic question relied upon by the petitioners to luce this Court to review the decision of the Court of ims is the question of the value of property requisitioned the United States Government from the plaintiffs where, reason of price ceilings and restrictions instituted and forced by the defendant, there did not exist any free rket in the United States for the property requisitioned, t where the property was non-perishable and could have en retained by the Plaintiffs until after the War was over d the price restrictions removed, and in fact was intended be so retained when purchased, and when a value based on each suggested measuring stick, except that of ceiling ice, was considerably in excess of the value found by the urt of Claims.

III

Specification of Errors

The Court of Claims erred:

1. In failing to find that the fair value of 759,750.88 unds of Whole Black Pepper, the subject of this action, s on May 26, 1944, the sum of $188,500 or 22 cents a und and in finding instead that said fair value was 113,-2.63 or 15¢ per pound.

2. In failing to find that the just compensation to which aintiffs are entitled for said property requisitioned and yment by the United States therefor is 22¢ per pound, a total of $188,500, together with interest at 4 per cent %) per annum from May 26, 1944, as an element of just mpensation, less the sum of $26,404.14 paid on November

27th, 1945, with interest thereon from the date of payment, and in finding or concluding ~~instead:~~

> "* * * that the Commodities Trading Corporation, or its distributees, are entitled to recover, and it is therefore adjudged and ordered that Commodities Trading Corporation, or its distributees, are entitled to recover of and from the United States a total of one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63), plus compensation for delay in payment computed at (4) per cent per annum on one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) from May 26, 1944, to November 27, 1945, less the amount paid plantiffs on the latter date of twenty-six thousand four hundred four dollars and fourteen cents ($26,404.14) and plus a further sum for delay in payment computed at four (4) per cent per annum on eighty-eight thousand eight hundred twenty-nine dollars and twenty-five cents ($88,829.25) from November 27, 1945, until paid."

3. In failing to find that the market price of Whole Black Pepper in British India on May 26, 1944, 21¢ per pound, delivered in New York, with freight and insurance paid, constituted a minimum measure of plaintiffs-petitioners' just compensation for the 759,750 pounds of Whole Black Pepper requisitioned by the United States Army from plaintiff, Commodities Trading Corporation, on the 26th day of May, 1944.

4. In failing to find that the "retention value" of plaintiffs-petitioners' said pepper, that is, the difference between the prices which it was reasonable to estimate on the 26th day of May, 1944, would exist at the end of the War and upon decontrol of pepper from Government fixed prices, less the estimated carrying charges from May 26th, 1944 to the expected end of the War and of decontrol, is a proper measure for determining the just compensation to plaintiffs-

for the pepper in question, seized by the United States Army, and that plaintiffs-petitioners are therefore entitled to recover the full amount demanded in the Complaint, or $190,000, with interest, less the payment of $26,404.14, with interest.

5. In failing to find that the price at which plaintiffs-petitioners could have replaced the said pepper at the first opportunity for so doing was in excess of 50 cents per pound, and that such replacement cost measures the just compensation to which plaintiffs-petitioners are entitled, and that as said replacement value is far in excess of the amount demanded in the Complaint, plaintiffs-petitioners are entitled to the full amount demanded therein.

6. In failing to find that the price at which it was reasonable to estimate in May, 1944, Whole Black Pepper would have sold at that time had there been no War, is a minimum measure of just compensation to plaintiffs-petitioners, which said price was in excess of 20 cents per pound.

7. In failing to find that the net amount which plaintiff-petitioner could have realized from the use and sale of its pepper as the foundation for synthetic or imitation pepper constituted a factor for determining just compensation and required an allowance therefor of at least 22 cents per pound.

8. In failing to find that the average cost of all of plaintiffs-petitioners' pepper at the time of the requisition here in question was 14.59 cents per pound, and that the average cost of the pepper actually requisitioned was 14.59 cents per pound, and that such amount, plus a fair profit, was in excess of 20 cents per pound, and that such amount constitutes a minimum measure of just compensation.

9. In failing to find that on the 26th day of May, 1944, there was no market in Whole Black Pepper in the United

States and none had been offered during any month of the year 1944 prior to October, when the O. P. A. raised the ceiling price to 10¢ per pound.

10. In finding that the ceiling price of 6.75¢ per pound for Whole Black Pepper was approximately the fair market price as of December 11th, 1941 (Finding No. 10, R. 16) and in failing to find that such market was a depressed one.

11. In finding that between September 30th, 1943 and the date of the requisition on May 26th, 1944, very little Whole Black Pepper was sold out of these inventories (inventories of importers) (Finding No. 14 R. 18).

12. In failing to find that the pepper sold by Commodities and referred to in Special Finding No. 19 (R. 19), was sold under pressure and was not a voluntary sale (See Opinion of Court R. 27).

14. In failing to find that the pepper sold by plaintiffs at 16¢ per pound, mentioned in said 19th Finding, was sold under pressure and was not a voluntary sale.

15. In finding that plaintiffs offered to sell 1,000,000 pounds of pepper to the Army at 9¾¢ per pound, as found in Finding No. 22 (R. 20).

16. In finding that between January 1st, 1943, and November 8th, 1943, plaintiff, Commodities Trading Corporation, had sold 98,267 pounds of Whole Black Pepper at 6.5¢ a pound (Finding No. 22, R. 20), and in failing to find that said sale was not voluntary, but was under pressure.

17. In failing to find in connection with the facts found in said Finding No. 26 (R. 22-23), that it is seven years after planting before pepper vines produce at a normal rate, and in finding in said 26th Finding that the pepper vine has a bearing period of from ten to fifteen years, with an average

bearing period of about eleven years, and in failing to find that the total bearing period does not exceed eleven years, and that the period during which normal production continues does not exceed seven or eight years.

18. In finding in said 26th Finding (R. 22-23) that new plantings would have begun to bear about 1945 or 1946, and in failing to find that there were no new plantings of any consequence subsequent to 1937 and prior to the Japanese invasion in the Winter of 1942.

19. In failing to give sufficient effect to the market price in British India, at the date of requisition, in finding just compensation.

20. In failing to give sufficient effect in determining just compensation to the "retention value" of plaintiffs' pepper, based upon what plaintiffs could actually have realized for their pepper at the end of price control, if it had not been seized by the Government.

21. In failing to give sufficient effect in determining just compensation to what plaintiffs could probably have received for their pepper upon the end of price control, viewed from conditions as they existed at the time of requisition.

22. In failing to give sufficient effect in determining just compensation to the price which would have obtained in the United States in May, 1944 and on May 26th of that year, if there had been no War.

23. In failing to give sufficient effect in determining just compensation to the replacement cost of the requisitioned pepper.

24. In failing to give sufficient effect in determining just compensation to cost plus reasonable profit.

25. In giving effect in its determination of just compensation to plaintiffs' offer to sell to the Army, referred to in Finding No. 22 (R. 20).

26. In giving effect to Commodities petition for an amendment of Price Schedule 52, referred to in Special Finding No. 21 (R. 19-20) in finding the just compensation for the requisitioning of the pepper here in question.

27. In receiving in evidence Defendant's Exhibits Nos. 3 and 4 (Tr. 199, 201), over plaintiffs' objections.

28. In refusing to receive in evidence the affidavits of Fletcher H. Long and Ralph W. Olmstead, forming a part of Joint Exhibit "K" in Paragraph 15 of the Stipulation of Facts between the parties (Tr. 187-195, 208-211).

29. In refusing to receive in evidence Plaintiffs' Exhibit No. 5 for Identification (Tr. 182-185, 215).

30. In finding that part of Finding No. 23 (R. 21) wherein the Court found the market price of Indian pepper at 20¢ instead of 20.99 for May, 1944 (R. 35).

The above errors present all of the fundamental points raised by plaintiffs-petitioners. However, petitioner attempted to obtain from the Court of Claims findings of fact which would cover its case as fully as possible and made numerous requests to find facts that were in some cases not ultimate but supporting facts. Many of these the Court of Claims failed or refused to find. Defendant has assigned as error such refusals in the specification of errors which appear *supra* at pages 16 to 23 and to avoid encumbering the Record will not repeat them here.

IV. Statement of the Case

This action was begun by Commodities Trading Corporation, a Delaware corporation, hereinafter referred to

as "Commodities," to recover just compensation for 759,750.88 pounds of whole black pepper taken by the War Department, by requisition, on the 26th day of May 1944. (Petition, R. 7-10).

Irving Trust Company, a New York banking corporation, the pledgee of the pepper, for monies advanced in connection with the purchase thereof, was joined as a plaintiff (Spec. Fdg. No. 1, R. 11-13).

After this suit was brought, Commodities was liquidated and this claim was assigned pro rata to its stockholders in accordance with their respective stockholdings in the company. These stockholders were brought in as parties plaintiff by orders of the Court of Claims entered on the 17th and 31st days of March, 1948, respectively. They adopted the proceedings had and requested that said action continue in all respects as if each of said parties had been a party plaintiff from the beginning (Special Findings 1 and 2, R. 11-13).

"The said parties are the lawful owners and holders of said assets or claims" (Spec. Finding 1, R. 11-13).

Commodities presented and prosecuted its claim in accordance with the regulations of the War Department (Special Findings 6 and 7, R. 14-15).

The War Department made no payment to Commodities or to Irving when it seized the said pepper, but some eighteen months later and after suit was brought offered said plaintiffs $52,808.28 as full compensation. This was the O. P. A. ceiling price of 6½¢ per pound and was refused. On November 27th, 1945, $26,404.14, or one-half, was paid to said plaintiff (Special Finding 7, R. 14).

V. Facts

NO FREE MARKET FOR BLACK PEPPER IN THE UNITED STATES AT TIME OF REQUISITION AND NO SALES WHATEVER FOR MANY MONTHS BEFORE AND AFTER THAT TIME

The Court of Claims found:

"15. After December 1941 when the Government imposed price ceilings on pepper, there was no free and open market in the United States for pepper. All sales thereafter were subject to ceiling prices until August 1946, when ceiling prices were removed. Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942 as importers, other than Commodities, disposed of their holdings, and replenishment of their stocks had become impractical because of war conditions."

"19. In October 1944, subsequent to the requisition of the pepper in this case, the ceiling price of whole black pepper was increased by the Government from 6.5 cents to 10 cents per pound. There was no pepper being offered in the United States at the 6.5 cents ceiling price in any month of the year 1944 before October."

At the time of Requisition there was a world-wide shortage of pepper with prices as high as $2.00 per pound (Tr. 95).

COMMODITIES' BUSINESS, PLAN OF OPERATIONS, ACQUISITION OF ITS PEPPER, DESIRE TO KEEP ITS INVENTORY AND INDIFFERENCE TO CEILING PRICES

The above is perhaps best and most succinctly shown by quoting from Defendant's Exhibit 5 which is Commodities'

petition to O.P.A. for an increase in ceiling prices of black pepper dated August 16th, 1944:

"3. Petitioner's business is, and has been, the buying of pepper and holding the same for investment.

"It is not a dealer in pepper in the ordinary sense, but is an investor which began to purchase Black Pepper in 1933 to hold as an investment, principally because of the reduction of the gold content of the dollar and because of the fact that due to the lasting quality of pepper, and the definite cycles of low and high prices to which it has been subject for 75 years, it was a practical certainty that anyone buying at the prices paid by petitioner could sell at a profit if he held on sufficiently long, regardless of changes of price due to the reduction of the gold content of the dollar."

* * * * *

"By 1939 petitioner had accumulated over 25,000,000 pounds of Lampong Black Pepper and its dealings were largely responsible for the fact that the beginning of the War found this country in the fortunate position of having more than ten times as much pepper in storage than was usual during the years prior to this company's operations.

* * * * *

"(a) * * * petitioner purchased its pepper with the intent of carrying an inventory of upwards of 15,000,000 pounds for a number of years. It has never been identified with the spice or pepper trade, has never joined any associations, has never had any definite customers, has always been regarded by the pepper trade as an anomaly and an outsider, and its inventory has never been regarded in the trade as a part of the general pepper supply of the country. The ceiling price of 6.50¢ per pound is much below the cost of petitioner's investment, but until October last, it made no effort to secure any increase in the ceiling

price, and was not interested therein, as it desired to continue to hold its pepper, and it was only when it was informed that pepper was becoming scarce that it considered that it would part with its pepper in the public interest, if it could do so at a price that would not entail a loss; * * *"

"There seems to be an emergency, and petitioner is willing to go much more than half-way to assist the public authorities in meeting such emergency, and is willing to sell its pepper at 10¢ per pound, which is the approximate actual investment which petitioner now has in the pepper which it now owns and which is less than half of what it considers is the fair and reasonable value thereof, and the amount which it should receive as just compensation in case of requisition." (Tr. 217-226).

The relevance and importance of the foregoing facts put in evidence by the defendant is argued infra at pp. 51-60.

An agreement was subsequently made between Commodities and O. P. A. whereby the ceiling price was increased to 10¢ and Commodities agreed to sell upwards of 10,000,000 pounds of its pepper at that price. (Spec. Fdg. 19, R. 19).

Later another bargained increase in the ceiling price was made, this time to 16¢ (Spec. Fdg. 19, R. 33-34).

"PRACTICAL CERTAINTY THAT ANY ONE BUYING AT THE PRICES PAID BY PETITIONER COULD SELL AT A PROFIT IF HE HELD ON SUFFICIENTLY LONG"

The above statement in Defendant's Exh. 5 (Tr. 218) was based upon the definite cycles of low and high prices to which pepper has been subject for 75 years (Finding No. 9, R. 15-16).

In 1927 there was a short crop and prices rose to above 40¢ and remained abnormally high for three years or more (Spec. Fdg. 9, R. 15-16; Tr. 67, 74-75, 99).

Following the abnormally high prices of 1927, 1928 and 1929, prices dropped to an abnormally low price of something more than 3¢ per pound six or seven years later, but had risen to 6.75¢ per pound at the time of the outbreak of the War (Spec. Fdg. 9, R. 15-16, Tr. 14-15, 67).

In 1944 it was evident that very high prices would follow immediately upon decontrol. The existence of such definite cycles of prices shown graphically in said Finding 9 was not accidental, but was the result of definite laws of nature and human proclivities (Tr. 74-75).

The Court of Claims gives a brief description of this as follows: (Spec. Fdg. 26, R. 23)

> "26. The pepper vine which produces Lampong pepper is planted in Sumatra on land cleared out of the jungle. The plant does not bear any fruit for the first four years, during which constant cultivation is required, but then has a bearing period of from ten to fifteen years, with an average bearing period of about eleven years. The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and sometimes lead to neglect of established vines. The 1926 Lampong crop was the smallest in history, with the result that prices reached the highest levels ever recorded; this greatly stimulated planting, leading to a period of very low prices some five years later. This in turn reduced plantings . . ."

While the pepper vine does begin to bear 4 years after planting, it does not reach its normal bearing capacity until it is 7 years old. It then bears for approximately 7 years more and then ceases to bear (Tr. 134-135, 159-160).

Its commercial bearing life is 6-9 years (Tr. 134-135, 159-160).

The Court stated correctly that high prices stimulate planting and that later there is heavy production, with consequent low prices. These low prices retard new plant-

ings and lead to neglect of established vines. When gardens are neglected they are quickly reclaimed by the jungle (Tr. 134).

As a result of such cessation of planting and neglect another period of shortage in the future becomes inevitable and the price rises. The natives who produce the pepper see this. They then begin to plant heavily again, and 7 years later there is another period of over-production and another fall in prices begins (Tr. 82-84, 133-138, 160-1).

The abnormally low prices of 1937 to 1939—3¢ plus—so discouraged the natives that practically no new vines were planted from 1937 to Japanese occupation, and many established gardens were allowed to be reclaimed by the jungle. (Tr. 99, 134-135, 138, 143-144). In 1941 there was a decrease of 40% in production. (Tr. 140.)

When Commodities determined upon building up its investment in pepper, it had this historical matter before it, but by January 1, 1942, prior to the invasion of Sumatra by the Japanese, it also had the evidence that the natives, true to form, had stopped planting in 1937 and had neglected established gardens, due to the abnormally low prices of 1935, 1936, 1937 and 1938 and that by the latter part of 1941 another period of shortage in the near future was inevitable with consequent high prices (Tr. 67-9, 139-142).

This matter is discussed more fully infra in connection with the argument with respect to what Commodities lost through the requisition of its pepper, Plaintiff's second point pages 51-56.

BY 1944 A WORLD-WIDE SHORTAGE OF PEPPER EXISTED WITH CONSEQUENT HIGH PRICES

Between March 1942 and Sept. 1943 a world-wide shortage of pepper developed and prices in those countries where dealings were unrestricted had risen greatly and by May 1944 were in excess of 40¢ per pound in most countries of

the western hemisphere and were as much as $2.00 per pound where there was no ceiling price.

In defendant's Exhibit "5," above referred to, it is stated:

> ". . . in England, where there is a ceiling price of approximately 20¢, it is difficult to obtain pepper at that price."

England of course controlled the supply of British India the next largest producer of black pepper after Sumatra (Tr. 12-4, 60-61).

BY MAY 26TH, 1944 THE PEPPER TRADE CORRECTLY FORECAST THAT DECONTROL WOULD BE FOLLOWED BY VERY HIGH PRICES FOR PEPPER

On the above point the Court found:

> "16. There was connected with the Office of Price Administration a board of advisers relating to commodities. The board of advisers for spices, including pepper, composed of leading men in the pepper industry, importers, brokers and dealers, recommended that the ceiling price for pepper be increased; that the trade would be able to keep this commodity on what it believed would be a fair level of between 20 and 30 cents per pound; that if the prices were kept at the original levels of 6.5 or 6.75 cents per pound the market would be apt to rebound to a much higher level as of the date of decontrol." (R. 18)

WHOLE BLACK PEPPER LASTS INDEFINITELY, IS NOT A NECESSARY ARTICLE OF FOOD, COULD NOT BE REQUISITIONED EXCEPT BY ARMY OR NAVY AND COMMODITIES COULD HAVE KEPT ITS PEPPER UNTIL THE END OF CONTROL AT COMPARATIVELY SMALL COST.

Whole black pepper is practically indestructible and lasts indefinitely (Finding 25, R. 22). It is not a necessary article of food. The average consumption is only ¼ pound per person per annum (Tr. 26). It was not necessary for the defense of the United States and at the time of the requisi-

tion here in question the plaintiff had obtained a temporary injunction against members of the Department of Agriculture and others forbidding the taking of its pepper. It was later held by the U. S. District Court that neither the War Powers Act nor any other law conferred such right upon the government. This of course did not apply to a requisition by the Army or Navy (Defendant's Ex. 5, Tr. 220).

No freezing or priority orders had been made with respect to pepper and no restrictions upon sales except the ceiling prices of Reg. 52 and the War Production Board orders restricting purchases by packers and others to 100% then 90% then 60% and finally 40% of prewar purchases (Court's Finding 13 R. 17-18). There were also restrictions with respect to exports. But plaintiff Commodities had the right to hold its pepper until after the war and regulation ended.

The cost to plaintiff of holding its pepper to that time would have been ½ cent per pound per year according to its claims and about ⅛ cent according to the allowance made by O.P.A. (Findings 21 and 24 R. 19-20, 21, Defendant's Exhibit 1.)

BY MAY 26TH, THE PRICE OF WHOLE BLACK PEPPER WOULD HAVE BEEN IN EXCESS OF THE AVERAGE PRICE OF 13½¢ AND WELL ON ITS WAY TO ANOTHER PEAK, IF THERE HAD BEEN NO WAR.

Upon this point the Court of Claims found:

> "26. • • •. If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1944 or 1945, when new plantings would have begun to bear. This decreased supply during the period from 1942 to 1944 or 1945 would have had effect in raising pepper prices in the United States." (R. 22-23)

As new plantings had practically ceased as early as 1937 and as the 1941 crop was produced in good pepper produc-

ing weather but was nevertheless 40% less than the preceding years it will be seen how great was the shrinkage to be expected (Tr. 139-140).

The witness Griesheimer, a native of Holland who had lived in the Dutch East Indies for more than 20 years and who had estimated the Lampong crops for many years as a part of his business gave a very gloomy picture of conditions in 1941 resulting from the abnormally low prices of the preceding years (Tr. 129, 139-142).

The witness, Archibald, who had been a dealer and broker in pepper in New York covering more than 20 years, stated that, in his opinion, the shortage due to the cessation of planting new vines would have affected the market price of pepper to such an extent that by May, 1944 the price would have been in excess of the average price of 13½¢ and would have been well on its way to another peak (Tr. 99-100).

The above quotation from the Court's finding sustains plaintiffs' argument but it contains one error. There was no proof that the natives had resumed or intended to resume planting. There were no new plantings to begin bearing in 1944 or 1945 (Tr. 143). Plaintiffs assigned error to that portion of the finding. (Specification of error No. 18)

THE REASONABLE COST OF PLAINTIFFS' PEPPER, BOTH THAT REQUISITIONED BY THE ARMY AND THE AVERAGE OF ALL ON HAND AT THAT TIME, WAS 14.59¢ PER POUND.

Plaintiff's witness Corbitt who kept Commodities' books testified in detail to the above figures (Tr. 123-124). This is discussed fully *infra* pages 65 to 67.

The Court found cost at 12.7¢ (Finding 24 R. 21-22) but stated that

> "The foregoing costs do not include any amount for officers' salaries, supervision or purchasing, expenses

to commodities during the period the pepper was purchased and held. No interest is computed upon costs of any of the carying charges but only on Commodities' original Costs." (R. 22)

In its tabulation in said Finding 23 (R. 21-22) it allows for "Bank interest, commissions, cables, exchange etc." only 2.75 per cent per annum, an amount far below what was required. If correction is made for these two errors appearing on the face of said Finding 24 the cost is brought up to that stated by plaintiff's witness Corbitt.

THERE WERE MANY EXCEPTIONS TO REGULATION No. 52 AND MANY OUTLETS FOR PLAINTIFFS' PEPPER AT PRICES FAR IN EXCESS OF THE CEILING PRICE OF 6½¢, THE PRINCIPAL ONES BEING AS FOLLOWS:

(a) Sales to Puerto Rico, Hawaii and Alaska (no license required), but Commodities able to make sales for 14.19¢ per pound. (Finding 20, R. 19)

(b) Sales to Argentina (license required). Commodities able to make sales at comparable price of 20.5¢ per pound (Tr. 120, 80).

(c) Sales of less than one bag. Regulation No. 52 does not apply to quantities of less than one bag, but Food Distribution Order 19 and 19-a restricted bulk dealers such as Commodities from making such sales to regular trade, but permitted sales to Red Cross, Steamship Lines and others.

(d) O.P.A. permitted sales for 16¢ per pound and more of synthetic or imitation pepper, a concoction containing one-quarter real black pepper and three-fourths parched cotton seed hulls and other neutral and cheap agents (Findings 18, R. 18-19).

(e) O.P.A. permitted sales of ground pepper at 12½¢ and more when cost of grinding was less than ½¢ and cost of selling negligible but F.D.A. 19 pre-

vented plaintiffs from using this outlet. (Food Distribution Order 19-1; Finding 13, R. 17-18)

WENTY MILLION POUNDS OF BLACK PEPPER ALLOCATED TO UNITED STATES BY ALLIED FOOD BOARD WAS EXCLUDED BY O.P.A. THOUGH IT WOULD HAVE RELIEVED THE SITUATION GREATLY AND COULD HAVE BEEN PURCHASED FOR 21¢ PER POUND. (FINDING 23, R. 21).

This price is probably the fairest and most tangible basis r allowance to plaintiffs.

British India is the largest producer of black pepper ext to Sumatra and produces from 10,000 to 25,000 tons er year.

There was no ceiling price on pepper in India, but the rice was depressed because of the fact that the British overnment controlled the export of pepper and prevented ipments to points other than England and those under ritish control (Tr. 12, 13, 61, 81).

However, the Allied Food Commission of United States nd Great Britain prior to 1944, and in 1944, allocated everal thousand tons of Indian pepper of substantially ne same kind and grade as that of commodities for United tates consumption. But, while there was no physical imediment to the importation of this pepper, none of it was nported because of the restrictions of Regulation 52, hich made it a crime to buy or sell pepper at higher than ne ceiling price, and because of the refusal of the O.P.A. accede to the importunities of the trade and raise its iling price so that this Indian pepper could be imported nd used in the United States (Finding 23, R. 21).

Upon this point, the Court found:

"23. Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 per cent of the pepper it raises and exports the balance.

"Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		Cents
February	21.25	July	19.71
March	21.20	August	19.40
April	18.55 to 19.00	September	16.90
May	20.00	October	19.76
June	20.99		

"These prices included insurance and freight paid to New York. In other words they were prices delivered in New York.

"However, because Office of Price Administration, Regulation R.P.S. 52 provided that no one could purchase or import pepper at higher than the maximum prices established in that schedule, i.e., 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper." (R. 21).

THE GOVERNMENT'S REFUSAL TO RETURN THE EXCESS PEPPER REQUISITIONED AND ITS SELLING OF SAME FOR 75¢ PER POUND AT THE CLOSE OF THE WAR IS RELEVANT ON THE SUBJECT OF THE VALUE OF COMMODITIES' PEPPER AND IS ALSO A STRONG ARGUMENT THAT SOME LIBERALITY SHOULD BE EXERCISED IN ESTIMATING WHAT COMMODITIES LOST THROUGH THE TAKING OF ITS PEPPER.

The Army requisitioned far more Lampong Black Pepper than it needed and had on hand large quantities at the end of the War (Tr. 24-25, 82).

Efforts were made by dealers and representatives of the pepper trade to induce the Army to return this surplus pepper to the persons from whom it had requisitioned pepper, but the Army refused so to do (Tr. 82-83).

On or about the 16th day of November, 1946 plaintiff, Commodities, or its individual stockholders, said plain-

ff being in the process of dissolution, were offered by e Government the privilege of purchasing a proportion the pepper requisitioned from plaintiff, Commodities, 75¢ per pound.

This offer was accepted by some of said Stockholders Tr. 182-186, 215-216).

FIRST POINT

here Was No Market in the United States for Whole Black Pepper in May, 1944

Upon the above point the Court found:

"15. After December 1941 when the Government imposed price ceilings on pepper, there was no free and open market in the United States for pepper. All sales thereafter were subject to ceiling prices until August 1946, when ceiling prices were removed. Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942 as importers, other than Commodities, disposed of their holdings, and replenishment of their stocks had become impractical because of war conditions" (R. 18).

"18. During the years 1943 and 1944, which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agents.

"This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound. The ceiling price for ground black pepper was then 12½ cents per pound" (R. 18-19).

"19. In October 1944, subsequent to the requisition of the pepper in this case, the ceiling price of whole black pepper was increased by the Government from 6.5 cents to 10 cents per pound. There was no pepper being offered in the United States at the 6.5 cents ceiling price in any month of the year 1944 before October. Prior to increasing the ceiling price, the Office of Price Administration and the Department of Agriculture had obtained an informal agreement from Commodities to sell about seven million pounds of its pepper at the 10-cent price, and after the price was so increased in October 1944 Commodities did sell approximately seven million pounds of pepper at that price (R. 19).

"In March 1946, following similar negotiations between Commodities and the Government, the ceiling price of whole black pepper was increased to 16 cents per pound and thereafter Commodities sold its remaining inventory of pepper, amounting to about three million pounds, at that price (R. 19).

"These increases were made in order to obtain a distribution of pepper which was not obtainable at the lower ceiling prices, and were made only after negotiations by the Office of Price Administration with Commodities and other dealers in pepper, to the end that large quantities of pepper would be sold upon such increase in ceiling price" (R. 19).

While the above findings support the fact that there was no market in the United States, they do not by any means show the extent of the world-wide scarcity which caused the Department of Agriculture to try to requisition practically all of the pepper in the United States in March, 1944 and which shot prices up to $2 a pound where there were no ceilings against an average price over many years of 13½ cents and a historical high of 42 cents (Finding No. 9, R. 15-16).

Second Point

Whole Black Pepper is not Perishable but Lasts Indefinitely and is Easily Stored. The Reasoning of no one of the Justices in the Felin case * has any application to the Case at Bar.

On the above point the Court of Claims found as follows:

> "25. Whole black pepper is not perishable and will last unimpaired in quality for several decades." (R. 22)

It is not of importance as an article of food and the average annual consumption in the United States is only one-quarter of a pound per person per year. (Tr. 26.) Whole black pepper is easily stored and plaintiff could have held its pepper until the end of the war at an overhead of only approximately one-half of one cent per pound per year, as found by the Court of Claims. (Findings 21 and 24, R. 19-20, 21-22.)

This Court in the *Felin* case, above referred to, by no means held that the ceiling price was the measure of just compensation, particularly where the property taken was not perishable.

The majority opinion reversed the Court of Claims upon the ground that its finding of fact with respect to the cost of replacement was wrong.

In a concurring opinion Mr. Justice Reed with whom Mr. Justice Black and Mr. Justice Murphy concurred, said: ". . . I believe that whenever *perishable* property is taken for public use under controlled-market conditions the constitutionally established maximum price is the only proper standard of 'just compensation'." (p. 643) He later said with respect to the effect of the ceiling price:

> "It would be anomalous to hold that Congress can constitutionally require persons in the position of the

* *United States* v. *Felin & Co.*, 334 U. S. 624.

respondent to sell their perishable property to the general public at a fixed price or not to sell to anyone and later to hold that the Government must pay a higher price than the general public where it requisitions the perishable property because of a replacement cost, greater than the fixed price. It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to the general public at ceiling prices was hardly less severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction. The two situations are so parallel that the constitutionally established maximum price may, under the circumstances here, be properly taken as the measure of 'just compensation.' That lawfully fixed market price determines what the perishable article can be sold for or its market value in any real sense. It gives to the condemnee any profit for increased value in his hands and takes nothing from him that he could lawfully obtain since consequential damages for loss of good will cannot be obtained. Such maximum price is 'just compensation.' " (P. 645-6)

Throughout this opinion stress is put upon the fact that the property seized was *perishable*.

On the other hand, Mr. Justice Jackson, with whom Mr. Justice Douglas concurred, states as follows:

"It is hard to see how just compensation can be the legal equivalent of a controlled price, unless a controlled price is also always required to equal just compensation. It never has been held that in regulating a commodity price the Government is bound to fix one that is adequately compensatory in the constitutional sense, so long as the owner is free to keep his property or to put it on the market as he chooses. If the Government were required to do so, the task of price regulation would be considerably, if not disastrously, complicated and retarded. It seems quite indispensable to the Government itself, for the long-range success of price con-

trols, that fixed prices for voluntary sales be not identified with the just compensation due under the Constitution to one who is compelled to part with his property.

"The war did not repeal or suspend the Fifth Amendment. *United States* v. *New River Collieries*, 262 U. S. 341, 343; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 88. But it is obvious that the constitutional guaranty of just compensation for private property taken for public use becomes meaningless if the Government may first, under its 'war powers,' fix the market price and then make its controlled figure the measure of compensation." (p. 651-2)

Thus, two of the Justices of the Court held that a ceiling price should never be considered as fixing just compensation, which view seems to be fair and logical. Three Justices, however, took the view that the ceiling price did measure just compensation *where the property taken was perishable*. They took a practical and realistic view of the situation, holding that because the owner had to sell perishable property and could not sell above the ceiling price, the ceiling price measured all that he could get and therefore the value of the property taken and just compensation. The three Justices, however, who concurred in the prevailing opinion, apparently disagree with the view taken by Justices Reed, Black and Murphy.

Thus, in the prevailing opinion, Mr. Justice Frankfurter stated:

> "We are not passing on the abstract question whether a lawfully established maximum price is the proper measure of 'just compensation' whenever property is taken for public use. We are adjudicating only the precise issues that emerge from this case." (p. 630)

The issue presented to the Court concerned perishable property and the whole question might easily have been determined and the same result reached, by a brief and

simple route,—instead of by a laborious analysis of the facts, if a majority of the Court had agreed with the view of Mr. Justice Reed, above stated. It is plain therefore that those justices were not ready to accept the thesis that ceiling price measures just compensation even where the property taken is perishable.

The ninth Justice, Mr. Justice Rutledge, concurs in the result and agrees in part with the prevailing and concurring opinions, but, on the precise subject here under discussion, he says:

> "It may be, as my Brother Reed and those who join with him think, that the ceiling price in a Wartime controlled market should furnish the measure of Constitutional just compensation for the property of a highly perishable nature." (p. 647)

The Justice, however, rests his decision upon the failure of Felin to sustain the burden of proof of replacement cost.

So we have this situation. Two Justices denied that ceiling price should measure just compensation *in any case.* Three Justices considered that ceiling price was the realistic just compensation *where the property was perishable,* and based their opinions squarely on that fact. One Justice considered that that view might be correct but did not so hold and three Justices declined to pass upon the effect of ceiling price upon just compensation even where the property taken was perishable. Thus it may be said that six expressed themselves on the subject of the effect of ceiling price on just compensation and all six considered that ceiling price did not measure just compensation except where the property taken was perishable. The other three apparently held the same view.

Other facts in the case at bar are as different as could possibly be imagined from those which impelled the conclusions of Mr. Justice Reed above quoted. Thus, he says:

> "It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to the general public at ceiling prices was hardly less severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction." (p. 645-6)

This is a powerful argument in favor of the view taken by those Justices, but it has no relation to the question here presented and to Commodity's property.

The opinion of the Court of Claims states as follows:

> "This so-called retention value is particularly applicable in this case. Plaintiff, Commodities Trading Corporation, was not a trader in pepper. It was rather an investor in pepper. It began buying pepper in 1933 and by Pearl Harbor Day in 1941 it had accumulated a stock of 21,000,000 pounds. It was accumulating this stock in the expectation that there would be a considerable rise in the price of pepper, at which time it expected to dispose of it. * * * Commodities Trading Corporation bought most of its pepper at low prices in anticipation of the rise in price which the history of the industry showed must inevitably come. Except for the fact that the Government requisitioned its pepper, Commodities would have held it until the next rise in price and then would have sold it. It has been denied the right to do this by the Government's requisition" (R. 40).

While the above is quoted from the opinion and the Court of Claims made no findings to cover the situation, the facts proven fully covered the same (Tr. 31-36, Special Finding No. 5, R. 14). Requests to find those facts were made to the Court of Claims and the failure of the Court to find such facts is raised by petitioner's assignment of errors with respect to such failure (Pls. Requests for Findings No. 5, 76, 77 and Assignment of Errors 13, 14, 20 in Petition, pp. 15 & 16, *supra*).

Hence, the objection of "economic hibernation or extinction" does not apply to Commodities which was not a dealer in pepper, did not have to sell and did not even wish to sell. Commodities' situation is shown more fully at pages 38 to 42, *supra.*

Thus the situation of Commodities and that of the Felin Co. were as far apart as the poles.

THIRD POINT

Plaintiff lost through the taking of its Pepper, Upwards of $190,000, and suffered Damage through Delay in Payment.

In the prevailing opinion in the *Felin* case, *supra,* this Court says:

> "Just compensation is a practical conception—a matter of fact, and not of fiction." (p. 641)

and further

> "In enforcing this Constitutional requirement, (the just compensation required by the Fifth Amendment), the question is 'What has the owner lost, not what has the taker gained?' (*Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; *McGovern* v. *New York,* 229 U. S. 363). Respondent's sole claim is for the pecuniary equivalent of the property taken." (p. 630)

The above is precisely what these plaintiffs claim. Commodities lost 759,750 pounds of its inventory of Whole Black Pepper (Findings 3, R. 13). What must plaintiffs be paid to put them in as good a position pecuniarily as they would have been in if the property had not been taken?

As found by the Court of Claims and as above stated, there was not only no free market in the United States, but there was no market whatever and no Whole Black Pepper had been sold in the United States for months prior to May

26, 1944 (Findings 15 and 19, R. 18-19). There was a world-wide shortage of pepper. The Japanese had taken possession of Sumatra, and India was the only pepper producing country which was not cut off from the allies. Destruction by the Japanese had permanently reduced Sumatra's ability to produce (Tr. 19, 145), and Commodities could have sold in Latin America and other countries for as much as $2.00 a pound if it had not been restricted in exporting and in the price it could charge the foreigner (Tr. 95).

The pepper trade and the technical advisers of the O. P. A. had urged it for months previous to May 26, 1944 to increase the ceiling price of pepper to from 20¢-30¢ per pound and thereby permit the purchase of Indian pepper and the sale of it in the United States at reasonable profit and had warned the O. P. A. that if it refused to follow this advice, decontrol of the price of pepper would see abnormally high prices and the country and the industry would be injured (Findings 16 and 17, R. 18).

At the end of price control the price of pepper immediately shot up to 60¢ per pound and soon to 80¢ (Finding 18, R. 18-19). In May, 1944 it was recognized that such prices would follow decontrol.

Plaintiffs' property was non-perishable, as above shown, and would last indefinitely (Finding 25, R. 22).

They could have held their pepper until decontrol or until offered a fair price.

There was a condition of stalemate. There was a great demand for pepper existing and the price made little difference to the user, the average use being only about one-quarter pound per year (Tr. 26). In these circumstances, the Federal Food Distribution Bureau insisted that Commodities sell, and sought to force it to do so and to requisition its pepper, but O. P. A. refused to increase the ceiling price, and Commodities had been able to maintain its posi-

tion. Thus, although Commodities could not sell at any price which it considered fair, neither could it be forced to part with its property, except for Army or Navy use.

So Commodities lost through the taking of its 759,750 pounds of pepper, property which it could have held to the time of decontrol and for which it could have obtained the high prices prevailing at that time.

From the above, it is plain that plaintiffs suffered a very real loss—a matter of fact and not of fiction. To show the extent of that loss and to measure their just compensation therefore, plaintiffs proved all of the following bases which had been used by the Courts to determine just compensation: retention value, based on amounts which could actually have been obtained as soon as price control was terminated; retention value, based upon what could reasonably have been anticipated in May 1944; market price (Indian); estimated market price in May 1944, if there had been no War; replacement value; net amount obtainable for its pepper through use as basis of imitation pepper; and cost. Each of the said bases required the finding by the Court of Claims of an amount in excess of 20 cents per pound as plaintiffs' just compensation. Each of those bases will be considered separately in the points immediately following.

Fourth Point

The Retention Value of Petitioner's Pepper was Far More than 22¢ a Pound on the Basis of either Actual Prices at the End of Control or Predictable Prices at that Time.

The opinion of the Court of Claims, as quoted above, states:

> "This so-called retention value is particularly applicable in this case. Plaintiff Commodities Trading Corporation is not a trader in pepper. It was rather an investor in pepper" (R. 25).

The Court of Claims found:

> "17. After the removal of ceiling prices in August 1946, an active market in Lampong whole black pepper came into existence. Such pepper was sold in quantity at 50 to 60 cents a pound and upward; and at 40 cents a pound and upward for future delivery in 3 or 4 months" (R. 18).

But the opinion shows that "the price shot up to more than 40¢ immediately after restrictions had been removed and it went on up to 75 and 80¢" (R. 26). As plaintiffs are asking only 22¢ per pound, the exact amount which they might have obtained at the end of control and the exact cost of carrying the pepper to that time is of no practical importance.

With respect to the predictable price that plaintiffs could have obtained at the end of control, based on the information existing in May, 1944, we have the following facts:

(a) The world-wide shortage and prices up to $2.00 a pound (Tr. 53-56, 95).

(b) The permanent damage to Sumatra by the Japanese (Tr. 19, 145).

(c) The fact that world consumption ordinarily is more than one hundred and twenty million pounds per annum (Tr. 70).

(d) In March, 1942, seventy-eight to one hundred million pounds of pepper were held in the United States but this constituted nearly all the pepper there was in the world (Finding 8, R. 15). Prior to May, 1944 that one hundred million pounds had been reduced to approximately thirty-two million (Finding 14, R. 18, Tr. 54-56).

(e) The pepper trade and technical advisers of O. P. A. had warned it that if it refused to raise the price to 20¢

or 30¢ per pound the country would see abnormally high prices at decontrol and the industry and the country would be injured. (Findings 16 and 17, R. 18).

All of those facts indicated a price at decontrol approximately equal to the price which actually obtained at that time. But here again we do not have to quibble about small differences in prices as any price which any intelligent person familiar with the trade would have predicted in May, 1944 would have been far in excess of the 22¢ per pound asked by plaintiffs.

FIFTH POINT

The Market Price of Indian Pepper fully Sustains an Allowance of at Least 22¢ a Pound as Just Compensation for Plaintiff's Pepper Requisitioned on May 26, 1944.

The Court of Claims found with respect to the above:

"Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 percent of the pepper it raises and exports the balance.

"Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		Cents
February	21.25	July	19.71
March	21.20	August	19.40
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June	20.99		

"These prices included insurance and freight paid to New York. In other words they were prices delivered in New York.

"However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maxi-

mum prices established in that schedule, i. e., 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper'' (Finding 23, R. 21).

There is no difference in value between Indian pepper and plaintiffs' pepper (Tr. 3-4).

There was a free market in India in that there was no ceiling and the Indians could trade with each other freely. (Tr. 12, 21, 61-2). There was a depressed market, however, because the British Government had put restrictions upon the exportation of pepper from India. (Tr. 12, 13, 61, 81). Otherwise, the price would not have been 21¢ and the price in South America $2.00.

By May 1944, Commodities owned approximately 60% of all the pepper left in the hands of importers in the United States, and all the import pepper was concentrated in a few hands (Finding 14, Tr. 18). There was a loud public clamor for pepper in the Press and in Congress, and the fact that in these circumstances O. P. A. refused to permit the American public to supply itself with pepper at an import cost of less than 4¢ per individual per annum (Tr. 55-57), by letting in the Indian pepper, shows that there was a definite determination on the part of O.P.A. to force the liquidation at low prices of the pepper held by importers in the United States before letting in this Indian pepper. Hence the maintenance of the ceiling price was aimed directly at Commodities.

Without considering whether this was a proper or improper action on the part of O.P.A.,* it does seem plain that such action by it in preventing a market in Indian pepper in the U. S. at a price only one-half of that reached

* As a matter of fact, O.P.A. refused to increase its ceiling price of 6½¢ until directly ordered to do so by Judge Vinson (then Director of Economic Stabilization). (See Amendment to Regulation 52 of October 1944).

in peacetime in 1928 should not deprive these plaintiffs of the benefit of basing their claim for just compensation upon the market price of Indian pepper in May 1944.

India produces approximately 30,000,000 pounds per annum and the market price in such a country is certainly strong evidence of value.

The Indian market price is stated in Finding 23 as May 20¢, June 20.99¢. The May price is an error, probably typographical. The testimony upon which the finding was based was "May 20.99 and June same price" (Tr. 14). This is the cost delivered at the dock. It must then be handled, carted and stored. (Plaintiffs-Petitioners' assigned errors to above finding, No. 30, p. 17 *supra*).

SIXTH POINT

Plaintiffs' claim of 22¢ per pound is only what Commodities could reasonably have realized in May 1944 had no war intervened.

With respect to the above the Court found:

"If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States."

The graph found by the Court of Claims in its ninth finding shows that for 75 years the price of pepper moved in cycles and that those cycles were fairly regular in that the length of time between the several tops and the several bottoms was always about 15 years—the life of the pepper plant. (Findings 9 and 26, R. 16, 22-23). The evidence showed that pepper prices had moved in these cycles for over 100 years. (Tr. 37).

While the Court did not find the amount of the increase in price referred to above and while no witness stated it in cents per pound, the evidence shows that any reasonable estimate would put the total price above 20¢ in May 1944.

In support of the 20¢ price we have the following:

(1) The graph in Finding 9 (R. 15) plus the testimony showing that these cycles of recurring high prices went back 100 years.

Such a history of and by itself showed a high probability of repetition in the future.

The last top was 40¢ in 1928. The next top (no war occurring) should have been about fifteen years later or 1943.

(2) But we have more. The reason for the cycles was shown in Finding 26 as follows: The plant does not bear any fruit for the first four years, during which constant cultivation is required, but then has a bearing period of from ten to fifteen years with an average bearing period of about eleven years. The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and sometimes lead to neglect of established vines and the proof showed and the Court found that the conditions which had caused the rises in prices in the past had already happened in the years 1936 to 1942 and in a very exaggerated way. (Finding 26, R. 22-23).

The proof was much stronger than the findings and plaintiffs have assigned as errors the failure of the Court to find in accordance with the evidence. Assignment of errors — to —, pp. , *supra*.

The above strengthened the probability in 1941 of a recurrence of high prices in the near future. As the war came in December 1941 facts after that time cannot be considered in this connection. But there was more.

(3) There was direct testimony from an important dealer who had been familiar with the pepper market for 20 years that he knew of no reason why pepper prices should not follow the form of the usual cycle

and that by 1944 they would be in excess of the average and well on their way to another top. (Tr. 99 and 100).

An analysis of the above in connection with the graph in Finding 9 shows, plaintiffs submit, that a price of more than 20¢ by 1944 was most probable even if there had been no war. But there was a war. A war which caused great destruction in Sumatra and cut off all pepper producing countries except India and caused such a shortage of pepper that the price was as high or $2.00 in May 1944 in countries where there was no control. (Tr. 95, 56). The normal world consumption of pepper was over 120,000,000 pounds (Tr. 70). The 100,000,000 pounds which was held by U. S. importers in March 1942 (Finding 8, R. 15) and which was nearly all the pepper that there was in the world (Tr. 3) had been reduced to 28,000,000 pounds by September 1943 (Findings 14, R. 18). These war occasioned matters which increased a probable 20¢ price to an actual $2.00 price were none of them factors which justices of this Court said in the *Cors* Case, should be eliminated in determining just compensation.

Hence plaintiffs' claim to 22¢ should be allowed without question.

SEVENTH POINT

Commodites could have disposed of its pepper in May 1944 for more than 20¢ per pound and therefore its value and just compensation exceeded 20¢ per pound.

The Court of Claims found:

"18. During the years 1943 and 1944 which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground

parched corn, wheat, cotton seed hulls, or other neutral agent.

"This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound. The ceiling price for ground black pepper was then 12½ cents per pound."

The situation here is the converse of that which existed in the Felin case. There the Felin Company had no outlet for its pork chops in excess of the ceiling price and some of the Justices considered that this practical situation should be controlling as to value and just compensation.

Here Commodities could have ground its pepper, mixed it with three portions of parched wheat or cotton seed hulls and could then have sold the concoction for 16¢ per pound. As there would be only ¼ pound of pepper in the 16¢ concoction, the pepper itself would sell for 4¢ an ounce. The Court can take judicial notice of the cheapness of wheat or cotton seed hulls.

The cost of grinding black pepper is only a fraction of a cent per pound (Tr. 156):

EIGHTH POINT

Cost plus a reasonable profit justifies and requires an allowance in excess of 20¢ per pound.

The Court of Claims found the cost of plaintiff's pepper to be 12.7¢ (Finding 24, R. 21-22). But in making said finding the Court stated therein as follows:

"The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses to Commodities during the period that pepper was purchased and held. No interest is computed upon costs of any of the carrying charges, but only upon Commodities' original cost."

Moreover, the Court of Claims in said finding allowed for "bank interest, commissions, cables, exchange, etc.," only 2.75% per annum.

The interest allowed was not normal of which this Court can take judicial notice.* The interest found by the Court was based on the interest actually paid by Commodities which at one time was only ⅛ of 1% per month (Tr. 175-180). But this was explained by a vice-president of the lending bank who showed that the bank had as collateral for its loans to Commodities, the guarantees of several persons of great wealth, stocks and bonds dealt in on the New York Stock Exchange for many hundreds of thousands of dollars and the pepper itself. It was the safest possible kind of loan.

Moreover, the directors of Commodities kept balances with the bank of over $500,000. The bank was in effect loaning them their own money. And without risk. No wonder it was willing to do so at ⅛ of 1% at one time.

Petitioners have assigned error with respect to the above findings of the Court of Claims.

The Court of Claims in the *Cors* case considered favorably the inclusion in cost of the value of services rendered gratuitously by an owner and this Court apparently approved. Plaintiffs'-petitioners' cost with some important overheads omitted came to 14.49¢ per pound. (Tr. 123-4)

The addition of the value of gratuitous services and proper overhead would bring this figure up to approximately 17½ cents. Then if a reasonable profit for holding and managing the pepper for 9 years is added, the total should not be less than 21¢ or 22¢. So also if the 12.7¢ figure found by the Court of Claims is built up by including interest at a reasonable rate and applying it to *all* of plaintiffs' expenditures in connection with storing and holding its pepper, the cost found by the Court of Claims would be brought up to 16½ to

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* *United States* v. *Cors*, 337 U. S. 325.

17 cents per pound even without important overheads. And if a profit is added for carrying the pepper for nine years, the total exceeds 20¢.

NINTH POINT

The undisputed facts required an allowance for just compensation of more than 22¢ per pound.

There was no issue of fact. Defendant put on the stand only one witness. He did not contradict plaintiffs on any point and they did not contradict him.

The Court of Claims made findings on nearly every main point urged by plaintiffs. These findings were usually watered down statements of what had been proven and of what plaintiffs had requested it to find. Exceptions are assigned to these findings and to the failure of the Court of Claims to find according to the evidence. Hence the numerous errors assigned. However, even the findings actually made justify and require an allowance of the amount demanded in the complaint.

The Court of Claims evidently reduced the amount which it would otherwise have awarded because Commodities, as found by the Court, offered to sell to the Army for 9¾¢ in October 1943 and made application for an increase in the ceiling price of 1/24 of one percent per month for the time pepper had been stored in the United States. (Findings 22 and 21, R. 19-22).

The Court also took into account in reducing the allowance to plaintiffs the fact that it had made a bargain with O. P. A. to sell some of its pepper in October 1944 and again in 1946. These matters were not contradictory of petitioners' claim, were irrelevant and should not have been considered.

Conclusion

The petition for certiorari made by plaintiffs should be granted.

New York, New York, July 4, 1949.

Respectfully submitted,

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